IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. ....

AMERICAN NATURAL GAS COMPANY,
MADISON GAS AND ELECTRIC COMPANY,
MICHIGAN CONSOLIDATED GAS COMPANY,
MICHIGAN WISCONSIN PIPE LINE COMPANY,
MILWAUKEE GAS LIGHT COMPANY and
MILWAUKEE SOLVAY COKE COMPANY,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Petitioners American Natural Gas Company, Madison Gas and Electric Company, Michigan Consolidated Gas Company, Michigan Wisconsin Pipe Line Company, Milwaukee Gas Light Company and Milwaukee Solvay Coke Company pray that a writ of certiorari issue to review the judgment of the United States Court of Claims, entered in the above-entitled case on June 8, 1960.

OPINION BELOW

The opinion of the United States Court of Claims has not yet been reported. A copy of this opinion may be found in the Appendix, *infra* pp. 21 to 33.

JURISDICTION

The judgment of the Court of Claims was entered June 8, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1).

QUESTION PRESENTED

Whether the sale of 1,282,734 shares of the common stock of The Detroit Edison Company in 1948 by American Natural Gas Company, pursuant to a divestment order of the Securities and Exchange Commission issued under the provisions of Section 11 of the Public Utility Holding Company Act of 1935, constitutes a compulsory or involuntary conversion of a capital asset held for more than six months within the meaning of Section 117(j) of the Internal Revenue Code of 1939, as amended.

STATUTE INVOLVED

The statutory provision involved is Section 117(j) of the Internal Revenue Code of 1939, as amended, 26 U.S.C. (1952 ed.) § 117(j), now incorporated in Section 1231 of the 1954 Code. Section 117(j) provides in pertinent part:

> "(j) **Gains and losses from involuntary conversion and from the sale or exchange of certain property used in the trade or business.**
>
> * * * * *
>
> "(2) **General rule.** If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) of property used in the trade or business and capital

assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets. * * *"

STATEMENT

The stipulated facts, as adopted by the Court of Claims in its findings of fact, may be summarized as follows:

This is an action by American Natural Gas Company (hereinafter referred to as "American") and affiliated companies for the recovery of overpayments of income and excess profits taxes for the years 1944 to 1948. The amount of recovery sought is $9,472,157.80, together with interest thereon as provided by law.

The basis of this claim for tax recovery is that American in 1948 suffered a loss of $16,441,869.42 resulting from its sale of the common stock of The Detroit Edison Company.[1] American disposed of this stock pursuant to an order of the Securities and Exchange Commission issued under the provisions of Section 11 of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79k, which directs the Commission to effect the simplification of corporate structures and the integration of public utility holding company systems. The petitioners claim that this loss on the sale of

1. There is disagreement between the parties as to the amount of the loss suffered by American, based upon differing computations of the tax basis of the Detroit Edison stock. The parties by stipulation deferred consideration of the tax basis question until decision of the involuntary conversion issue. Since the Court of Claims dismissed the petition on the involuntary conversion issue, the basis question has not as yet been resolved. For present purposes the respondent's computation of the tax loss will be used.

stock is a loss from the "compulsory or involuntary conversion" of a capital asset, within the meaning of Section 117(j) of the Internal Revenue Code of 1939, as amended, and that under the provisions of that section the loss is deductible as an ordinary loss in computing American's net income.

The circumstances of the sale of the stock by American are as follows: After the Public Utility Holding Company Act of 1935 (hereinafter referred to as the "Act") became effective, American[2] and other companies in its holding company system filed registration statements with the Securities and Exchange Commission pursuant to Section 5 of the Act. American itself was a "holding company," as defined in Section 2 of the Act, and its assets included 1,289,205 shares, constituting 20.3%, of the common stock of Detroit Edison, an electric utility company (Findings 2, 3).[3]

Under Section 11(a) of the Act the Commission was required to examine the corporate structures of every registered holding company and the relationships among the companies in each holding-company system to determine the extent to which such corporate structures might be simplified, unnecessary complexities eliminated, voting power fairly and equitably distributed, and properties and business confined to those necessary or appropriate to the operations of an integrated public-utility system. Section 11(b)(1) of the Act imposed upon the Commission the duty

2. American was formerly known as American Light & Traction Company and is referred to by that name in the orders of the Securities and Exchange Commission quoted in the record. The change in name from American Light & Traction Company to American Natural Gas Company was made effective as of June 15, 1949.

3. References are to the paragraphs in the findings of fact, reported by the trial commissioner and adopted by the Court of Claims, which are submitted as part of the record in this case (R. 61-87).

to require by order that each registered holding company take such action as the Commission found necessary to limit the operations of the holding-company system to a single integrated public utility system.

Acting pursuant to Section 11(a) of the Act, the Commission on March 8, 1940, issued an order for a hearing directed to American and other holding companies forming a part of the system, asserting that the system was not confined in its operation to a single integrated public-utility system (Finding 4). Thereafter, in hearings and briefs American asserted its right and desire to retain its stock interest in Detroit Edison (Findings 5, 7).

Notwithstanding American's contentions, the Commission on August 5, 1941, issued a decision and order directing the simplification of the holding-company system and requiring, among other things, that American dispose of its Detroit Edison stock (Finding 8). The Commission's order of that date stated:

> "American * * * shall dispose of its interests in * * * The Detroit Edison Company, * * * and in the properties and assets owned or operated thereby." (Finding 8)

The order further directed the companies to proceed with due diligence to comply with its provisions and to make application to the Commission for the entry of further orders necessary or appropriate for that purpose. The Commission expressly reserved jurisdiction to enter such orders as might be necessary or appropriate to carry out the provisions of the August 5, 1941 order.

Thereafter, the companies in the holding-company system filed a series of applications with the Commission requesting its approval of various divestments required by the August 5 order, and a number of divestments within the

system were accomplished by virtue of supplemental orders issued by the Commission. Various proposals for methods of divesting the Detroit Edison stock were made and considered, but it was not until 1947 that a plan was finally approved by the Commission to accomplish that result. During the interim period, the Commission on several occasions threatened resort to Section 11(d) of the Act if plans of divestment were not promptly presented or amended to conform to the Commission's views (Findings 11, 13). Under Section 11(d), the Commission may apply to a court to appoint it as trustee to take jurisdiction and possession of a holding company's assets.

On December 30, 1947, the Commission issued an opinion and order approving a plan of divestment of the Detroit Edison stock. It directed the disposition of the shares of Detroit Edison owned by American by public sales and by distribution to stockholders during the year 1948.[4] The Commission concluded that the "foregoing divestments are specifically required by our outstanding order of August 5, 1941" (Finding 23).

Accordingly, American sold 450,000 shares of its Detroit Edison stock in January, 1948, 450,000 shares in April, 190,000 shares in August, and 192,734 shares in November. The balance of this stock was distributed to the shareholders of American. Each of the sales of the four blocks of stock was made pursuant to a Commission order which recited that the sale was "necessary or appropriate to the integration or simplification of the holding company system of which American Light is a member" (Findings 25, 26).

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4. In anticipation of the final order, the sale of the first 450,000 shares of stock had been authorized and directed by order issued November 19, 1947 (Finding 22).

The net proceeds from these sales of the Detroit Edison stock held for more than 6 months totaled $24,890,228.55. Since the tax basis of these shares was at least $41,338,260.02, American suffered a tax loss of $16,441,869.42 as a result of the sale of Detroit Edison stock pursuant to orders of the Commission, as detailed above (Finding 32).

In 1952 American and the other petitioners herein filed a timely claim for refund of income taxes for 1948, contending that the loss incurred by American was a loss from the compulsory or involuntary conversion of capital assets held for more than 6 months within the meaning of Section 117(j) of the Internal Revenue Code of 1939. In addition, claims for the refund of income taxes for 1947 and 1946 and excess profits taxes for 1945 and 1944 were filed, all of which were dependent upon the determination of the 1948 claim. All of these claims for refund were denied by the Director of Internal Revenue in 1954 and 1955 (Finding 30).

This action was commenced in the United States Court of Claims on January 3, 1956, under the provisions of 28 U.S.C. § 1491(2). After the parties agreed to a stipulation of facts, the trial commissioner of the court reported his findings of fact on May 12, 1959. On June 8, 1960, the Court of Claims handed down a decision dismissing the petition of the plaintiffs. In its opinion the court concluded that:

> "There can be no doubt that the conversion of the property was under compulsion, and we think it was involuntary. * * *."

Nevertheless, the court held that the transaction did not come "within the sort of compulsory or involuntary conversions described in the limiting clause, which is enclosed in parentheses" in Section 117(j).

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Claims in this case cannot be reconciled with this Court's decision in *Commissioner* v. *Gillette Motor Transport, Inc.*, 364 U.S. 130 (June 27, 1960), which came down three weeks after the decision below, or with the decision of the United States Court of Appeals for the Eighth Circuit in *Midwest Motor Express, Inc.* v. *Commissioner*, 251 F.2d 405 (1958), cert. den. 358 U.S. 875. The *Gillette* and *Midwest* cases, like this case, involved the interpretation of Section 117(j) of the Internal Revenue Code of 1939. Specifically, the courts in all three cases were concerned with the following language in Section 117(j):

> "* * * compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) of property used in the trade or business and capital assets * * *."

Section 117(j), now Section 1231 of the 1954 Code, provides that net gains from "involuntary conversions" of capital assets shall be treated as capital gains and that net losses from such conversions shall be treated as ordinary losses. This provision and Section 112(f) are relief provisions.[5] They were intended to postpone or ameliorate the tax consequences of transactions which result in the conversion of capital assets under a compulsive order of some governmental or quasi-governmental body. As the Court of Appeals for the Fourth Circuit recently stated in

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[5] Section 112(f) of the 1939 Code, now Section 1033 of the 1954 Code, provides for the non-recognition of gains resulting from compulsory or involuntary conversions of capital assets. The "involuntary conversion" language of Sections 112(f) and 117(j) is almost identical.

Stewart Brothers v. *Commissioner*, 261 F. 2d 580, 582 (1958), the "obvious purpose" of the involuntary conversion provisions of the Code is to provide tax relief:

> "• • • when [the taxpayer] does not liquidate his holding of his own will but parts with it involuntarily *by virtue of superior governmental power*, or loses it through circumstances over which he has no control." (Emphasis supplied)

In the present case, American was required by Commission order to divest itself of its holdings of Detroit Edison stock. Because the market value of that stock was relatively low at the time, American suffered a large tax loss on the sale. Having virtually no capital gains against which to offset the loss, American loses the entire tax effect of the loss unless Section 117(j) applies, in which case the loss may be offset against ordinary income. It is our contention that this is the very type of involuntary conversion Section 117(j) was intended to cover.

The *Gillette* and *Midwest* cases involved the question whether, when the Director of the Office of Defense Transportation had taken possession of certain motor carriers under Presidential order during World War II, an award by the Motor Carrier Claims Commission to the carriers as a result of this Government action constituted an involuntary conversion within the meaning of Section 117(j). This Court and the Court of Appeals both held that the award was not entitled to capital gains treatment under Section 117(j) because it was no more than a rental or use payment, and there was thus no "conversion" of capital. Both courts were of the view, however, that the Government action involved fully satisfied the parenthetical clause of Section 117(j), namely, "(as a result of . . . seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof)."

In the present case the Court of Claims adopted a precisely contrary interpretation of the parenthetical clause of Section 117(j). The court concluded, as the stipulated facts required, that the transaction was compulsory and involuntary and that the sale of the Detroit Edison stock was a "conversion" of a capital asset. However, the Court of Claims held that the parenthetical clause of Section 117(j) was not satisfied by the Government action taken and in effect ignored the significance of the action threatened by the Commission under Section 11(d) of the Act.

That section authorizes the Commission to apply to a court to take "exclusive jurisdiction and possession of the company or companies and the assets thereof." The court may appoint the Commission as trustee of "the assets so possessed," and the Commission has the "power to dispose of any or all of such assets." The record shows that the Commission threatened on a number of occasions to take such action under Section 11(d) if the Detroit Edison stock was not promptly divested. It further shows that American disposed of that stock pursuant to the August 5, 1941 order and the threats of Commission action under Section 11(d).[6]

Petitioners submit that there is no substantive difference between Government control of motor carriers for the purpose of insuring compliance with a War Labor Board decision, as in *Gillette* and *Midwest*,[7] and Government control

6. The parenthetical clause of Section 117(j) not only includes the terms "seizure," "requisition" and "condemnation," but it also applies to an involuntary conversion as a result of the "threat or imminence thereof".

7. The Executive Order involved in *Gillette* and *Midwest* clearly had as it purpose the enforcement of a War Labor Board directive order. See Executive Order No. 9462, 3 C.F.R. (1943-1948 Comp.) p. 322. The operations order provided that possession by the United States was "not exclusive" and that the United States would assert "only such control over the properties in its limited possession as may be necessary to accomplish the purposes" of the Executive Order. (251 F. 2d at 407)

of a public utility holding company for the purpose of insuring compliance with a Securities and Exchange Commission order, as in the present case. Since the former action constituted a "seizure" or "requisition" within the meaning of the parenthetical clause of Section 117(j), the decision of the Court of Claims to the effect that the threat or imminence of Commission action under Section 11(d) does not satisfy the parenthetical clause is clearly in error and contrary to the decisions in the *Gillette* and *Midwest* cases.

2. Apart from the specific inconsistency with this Court's decision referred to above, this case presents an important recurring question as to the interpretation of the kind of "superior governmental power" (to quote from the *Stewart* case) that qualifies a transaction for involuntary conversion treatment under Sections 117(j) and 112(f). The parenthetical clause of these sections refers generally to three types of Government action, namely "seizure, * * * requisition or condemnation or the threat or imminence thereof." However, these terms are by no means words of art.[8] Different interpretations of the terms "seizure," "requisition," and "condemnation" in the involuntary conversion context have been made by this Court in *Commissioner* v. *Gillette Motor Transport, Inc.*, 364 U.S. 130 (1960), by the Eighth Circuit in *Midwest Motor Express, Inc.* v. *Commissioner*, 251 F.2d 405 (1958),

8. The term "condemnation," for example, is used in the federal statutes to refer to actions involving misbranding or adulteration of foods, drugs or cosmetics (21 U.S.C. §334), misbranding of wool (15 U.S.C. §68c), or furs (15 U.S.C. §68g), adulterated seeds (7 U.S.C. §1595), war materials intended for unlawful export (22 U.S.C. §404), and prizes in admiralty (28 U.S.C. §1333). And the term "requisition" has been defined simply as "a demand in writing, or formal request or requirement" (Black's Law Dictionary (4th ed. 1951)) or a "formal demand for the performance of an obligation" (Webster's New International Dictionary (2d ed. 1957)).

by the Third Circuit in *Dear Publication & Radio, Inc.* v. *Commissioner*, 274 F.2d 656 (1960) and by the Court of Claims in the present case.

In *Gillette* this Court agreed that an executive order permitting the Director of the Office of Defense Transportation to take limited possession and assume control of certain motor carriers was a "seizure" or "requisition" under Section 117(j). The Court stated that these terms "equally cover instances in which the Government takes a fee or damages or otherwise impairs the value of physical property" (364 U.S. at 136). No requirement of the acquisition of the title to the property by the Government was imposed by the Court. This Court in *Gillette* recognized that title to the properties remained in the motor carrier and that the Government action involved was that the United States had "deprived" the respondent of the "right to determine freely what use to make of its transportation facilities" (364 U.S. at 133). On the other hand, the Court of Claims in the present case held that only the "exercise of the power of eminent domain," whereby a public or quasi-public corporation takes the property *for its own use*, would be sufficient Government action under Section 117(j).

In *Dear Publication & Radio, Inc.* v. *Commissioner*, *supra*, the Court of Appeals for the Third Circuit held that the sale of stock by a taxpayer to the other principal shareholder in a corporation after judicial proceedings had been commenced by the other shareholder under the New Jersey "deadlock" statute was not an involuntary conversion under threat of requisition or condemnation. The court emphasized that it was the presence of a private controversy and the absence of Government action that precluded the extension of involuntary conversion relief to the taxpayer. However, in referring to the meaning of

"requisition" and "condemnation" in the involuntary conversion provision of the Code, the Court of Appeals cited with approval (274 F. 2d at 660) the decision, *Mitsubishi Shoji Kaisha* v. *Societe Purfina Maritime*, 133 F.2d 552, 555 (9th Cir. 1942), cert. den. 318 U.S. 781, which indicated that a "requisition" may involve nothing more than direction by the Government to the owner of property to use or dispose of it in a particular manner required by the public interest. This, of course, would embrace the situation here presented. Petitioners accordingly submit that the decision of the Court of Claims is also inconsistent with the recent opinion of the Court of Appeals for the Third Circuit in the *Dear Publication* case.

Thus, a determination by this Court of a case squarely presenting the question as to the kind of Government action contemplated by the involuntary conversion provisions of the Code is essential in light of the conflicting views of this Court, the courts of appeals and the Court of Claims.

3. The characterization by the Court of Claims of divestments under the Public Utility Holding Company Act is inconsistent with past decisions of this Court. In the present case the Court of Claims held that in ordering the sale of stock the Securities and Exchange Commission was not exercising the power of eminent domain but was merely exercising the constitutional power to regulate interstate commerce. The court likened the Public Utility Holding Company Act to legislation aimed at public nuisances, such as narcotics, whiskey, firearms and unsafe or unsanitary property. It then cited a number of cases where it has been held that no compensation is required under the Fifth or the Fourteenth Amendment when there is legislation aimed at such public nuisances.

In the first place, the premise of the Court of Claims,

that American's tax claim was the same as a Fifth Amendment just compensation claim, conflicts with the decision of this Court in *Commissioner* v. *Gillette Motor Transport, Inc.*, 364 U.S. 130 (1960). There this Court rejected a similar assertion by the motor carrier as irrelevant to the question before it, when it stated:

> "But the fact that something taken by the Government is property compensable under the Fifth Amendment does not answer the entirely different question whether that thing comes within the capital-gains provisions of the Internal Revenue Code." (364 U.S. at 133).[9]

Accordingly, the contention of the Court of Claims that Section 117(j) does not apply because American received the fair market value for the stock sold begs the question. In practically all requisition or condemnation situations under Section 117(j) the taxpayer has been compensated for the fair value of his property, thereby satisfying the constitutional just compensation requirement, but he may have a *tax* gain or *tax* loss depending on the tax basis of the property converted.

Secondly, the characterization of American's ownership of the Detroit Edison stock as a public nuisance is in direct conflict with two decisions of this Court interpreting Section 11(b) of the Public Utility Holding Company Act. In *North American Company* v. *Securities and Exchange Commission*, 327 U.S. 686, 709-10 (1946) the Court, in upholding the constitutionality of Section 11(b) (1), held that

9. Thus, in *United States* v. *Caltex*, 344 U.S. 149, 155 (1952) this Court denominated an order by an army commander to evacuate premises slated for demolition as a "requisition," but it held that no compensation was required under the Fifth Amendment. So far as the language and purpose of Section 117(j) are concerned, the "requisition" involved in *Caltex* seems to be a clear case of involuntary conversion under Section 117(j).

the just compensation requirement of the Fifth Amendment had been satisfied by the safeguard in the Act that a plan of divestment be "fair and equitable" to those affected. Moreover, this Court suggested that an unfair plan of divestment might constitute an unconstitutional taking without just compensation. Yet this Court has consistently recognized that no just compensation at all is required when Government action results in the destruction of a public nuisance. See *United States* v. *Caltex, Inc.*, 344 U.S. 149 (1952); *Samuels* v. *McCardy*, 267 U.S. 188 (1925). In *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 107 (1946) this Court again emphasized that the statutory standards of the Public Utility Holding Company Act prevent the taking of property rights without just compensation. The holdings of this Court in these cases dealing specifically with divestments under the Act are directly opposed to the Court of Claims' treatment of stock ownership by public utility holding companies as public nuisances.

Moreover, the reliance of the Court of Claims upon the fact that this Court held in the *North American* case that the Public Utility Holding Company Act was enacted under the authority of Congress to regulate interstate commerce does not answer the separate and distinct question whether the order of divestment by the Commission was an involuntary conversion under Section 117(j). This Court has repeatedly held that "takings" under the power of eminent domain may occur under any of the enumerated powers of Congress, such as the interstate commerce power (*Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 337 (1893)), the power to raise armies (*United States* v. *Gettysburg Electric Ry. Co.*, 160 U.S. 668, 681-3 (1896)), and the power to legislate for the District of Columbia (*Shoemaker* v. *United States*, 147 U.S. 282, 298 (1893)). A "taking"

under the eminent domain power is merely a means to accomplish one of the enumerated powers of Congress. *Berman* v. *Parker*, 348 U.S. 26, 33 (1954).

Lastly, the decision of the Court of Claims in this case has injected confusion with respect to the nature of "takings" by the Government. The Court of Claims stated that a "requisition or condemnation" meant the taking of property "for the use of the taker" and that the Commission order of the sale of stock did not have the characteristics of such a "taking." However, as this Court recognized in *Berman* v. *Parker*, 348 U.S. 26, 33-4 (1954), the Government may take property solely for a "public purpose" and not for its own use. In *United States* v. *General Motors Corp.*, 323 U.S. 373, 378 (1945) this Court pointed out that "the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking." In *United States* v. *Powee Coal Co.*, 341 U.S. 114, 120 (1951), Mr. Justice Reed pointed out in concurrence that "takings" can assume various forms, one of which is where "the Government, for public safety or the protection of the public welfare, 'takes' the property in the sense of assuming the responsibility of its direction and employment for national purposes."

4. The question presented in this case concerns the interpretation of provisions of the federal tax laws in a factual situation that involves substantial amounts of tax losses. Petitioners believe that no federal statute has had an impact upon the corporate ownership of assets greater than the Public Utility Holding Company Act of 1935. Since 1935 the Securities and Exchange Commission has assumed jurisdiction under the Act over 2,387 companies.[10] In 1958 the Commission reported that 921 com-

10. 25 SEC Ann. Rep. (1960) p. 123.

panies with assets aggregating approximately $15.3 billion at their respective dates of divestment have been divested by their respective parents since the Act was passed.[11] In a report of the Commission, issued on January 6, 1960, it noted a number of divestments still before the Commission under Section 11(b) of the Act.[12] For example, it reported that the Commission recently ordered the Cities Service Company to dispose of its holdings in a subsidiary under Section 11(b)(2); that pending before the Commission is a plan of disposition of the gas properties of Blackstone Valley Gas & Electric Co.; that proceedings are pending under Section 11(b)(1) with respect to the retainability by The Columbia Gas System, Inc. of the properties of ten companies, with respect to the retainability by the New England Electric System of its gas properties, and with respect to the retainability of a subsidiary by Utah Power & Light Co.; that the Commission is currently considering the retainability of various gas and transportation properties owned by Middle South Utilities, Inc., of oil, real estate and gas businesses owned by National Fuel Gas Co., and of gas and electric facilities owned by Delaware Power & Light Co.[13]

In addition to the substantial amount of tax recovery in issue in the present case, the petitioners have been informed of at least two other tax claims involving precisely the same issue. By agreement with the Commissioner of Internal Revenue, the statute of limitations concerning claims of the Iowa-Illinois Gas and Electric Company, as successor agent of The United Light and Railways Company and affiliated companies, in the amount of $9,593,536.94 plus interest, has been suspended pending final decision of the present case.

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11. 23 SEC Ann. Rep. (1958) p. 103.
12. 25 SEC Ann. Rep. (1960) p. 122.
13. 25 SEC Ann. Rep. (1960) pp. 122-3.

The attorneys for the Koppers Company, Inc. have informed the petitioners of claims of that company for tax recovery of approximately $10,000,000 involving the identical issue. In light of the substantial number of divestments that have been ordered by the Securities and Exchange Commission and that are still pending before the Commission, it is reasonable to conclude that this issue will be presented in numerous other cases.

Congress recognized the significant relationship between the federal tax laws and divestments under Section 11 of the Public Utility Holding Company Act as early as 1938. In that year Mr. Justice Douglas, then Chairman of the Securities and Exchange Commission, appeared before the Senate Finance Committee urging certain tax relief measures in the case of holding company divestments. He testified with respect to these Section 11 orders by the Commission:

> "But, Mr. Chairman, since this is a compulsory transaction that they are going to be engaged in from now on, it does not seem to us fair and equitable for the government to force them to do this and at the same time to collect taxes as the result of their doing it. * * * We down at the Commission do not desire to put the gun at the head of a utility company and say, 'Transfer these,' and then to have another branch of the Federal government collect $2,000,000, or $1,000, or $250,000 as the result of doing what we are forcing it to do."[14]

In response to this testimony, Congress in 1938 amended the income tax laws to provide specifically for the nonrecognition of gains or losses in the case of certain divestments ordered by the Commission under the Act. These provisions were found in Supplement R (Sections 371-373)

14. Hearings before Senate Finance Committee on H.R. 9682, 75th Cong. 3rd Sess., part 4, p. 73.

of the Internal Revenue Code of 1939. Subsequently, in the Revenue Act of 1942 Congress amended Supplement R to expand its tax relief to the sale of assets at a *gain* resulting from Commission orders under Section 11(b) of the Act, noting that such divestments are "compulsory transactions."[15] At the same time, however, Congress provided that *losses* from such compulsory transactions should be recognized immediately, stating that:

> "* * * the recognition of the loss will be determined by the provisions of the Internal Revenue Code outside of Supplement R."[16]

In the same Revenue Act of 1942 Congress enacted Section 117(j), which provided for the first time that losses from "compulsory or involuntary conversions" of capital assets shall be treated as losses fully deductible from ordinary income.

Thus, since 1938 the Internal Revenue Code has contained specific provisions granting involuntary conversion-type tax relief to gain transactions resulting from divestments required by the Commission under the Public Utility Holding Company Act. However, since 1942 Congress has provided that losses arising under identical circumstances should be treated under "provisions of the Internal Revenue Code outside of Supplement R." This is the first case presenting the issue whether Congress intended Section 117(j) as the vehicle for tax relief in such circumstances. The question is of great significance in light of the many divestments that have already taken place under the Public Utility Holding Company Act. The question will certainly continue to arise in the future since the

15. H.R. Rep. No. 2333, 77th Cong., 2nd Sess. 1942, p. 123 (1942-2 Cum. Bull. 372, 463).

16. H.R. Rep. No. 2333, 77th Cong., 2nd Sess. 1942, p. 123 (1942-2 Cum. Bull. 372, 464).

Commission is continuing to order divestments under the Act. Supplement R of the 1939 Code, governing gain transactions under the Act, is an integral part of the current tax laws as Sections 1081 to 1083 of the Internal Revenue Code of 1954. 26 U.S.C. §1081-3. We submit that it is necessary for this Court to finally determine whether Section 117(j), now Section 1231 of the 1954 Code, is the provision governing the treatment of loss transactions resulting from divestments under the Act.

In short, it is essential that this Court review the decision of the Court of Claims in the present case or, in the alternative, to vacate the decision of that court with directions to reconsider the matter in light of this Court's decision in the *Gillette* case. Not only does the case present questions of substantial significance under the federal tax laws, but it deals with fundamental principles at the very heart of the Public Utility Holding Company Act.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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September, 1960.

APPENDIX

IN THE

United States Court of Claims

No. 3-56

(Decided June 8, 1960)

AMERICAN NATURAL GAS COMPANY, MADISON GAS AND ELECTRIC COMPANY, MICHIGAN CONSOLIDATED GAS COMPANY, MICHIGAN WISCONSIN PIPE LINE COMPANY, MILWAUKEE GAS LIGHT COMPANY, and MILWAUKEE SOLVAY COKE COMPANY v. THE UNITED STATES.

Mr. Arthur R. Seder, Jr., for plaintiffs. *Messrs. Middleton Miller, J. Bean Vail, Jr., Robert R. Frei, Jules M. Perlberg*, and *Sidley, Austin, Burgess & Smith* were on the briefs.

Mr. Jerome S. Hertz, with whom was *Mr. Assistant Attorney General Charles K. Rice*, for defendant. *Messrs. James P. Garland* and *Philip R. Miller* were on the brief.

OPINION

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiffs sue to recover an alleged overpayment of income and excess profits taxes for the years 1944 to 1948, both inclusive, in the amount of $9,472,157.80, plus interest allowed by law. Under orders of the Securities and Exchange Commission the predecessor of plaintiff American Natural Gas Company, both hereinafter referred to as

"American", sold its stock in The Detroit Edison Company in the year 1948 at a loss. Plaintiffs, who filed consolidated tax returns for the years in question, allege that they are entitled to deduct this loss from ordinary income; whereas, the Commissioner of Internal Revenue allowed the loss only to the extent of the capital gains.

The issue presented is whether or not plaintiffs are entitled to deduct from their ordinary income the full amount of the loss.[1]

They are entitled to do so, if at all, only by virtue of section 117(j) of the Internal Revenue Code of 1939, as amended by the Revenue Act of 1942. This section reads:

> (j) Gains and losses from involuntary conversion and from the sale or exchange of certain property used in the trade or business.
>
> * * * * * *
>
> (2) General rule. If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power or requisition or condemnation or the threat or imminence thereof) of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets. * * *

1. If they are, they sustained a net operating loss in 1948, which they will be able to use as a carryback to the preceding taxable years to offset or reduce the income for those years and, hence, to recover some or all of the taxes previously paid for those years.

Plaintiffs say that American sold its stock in the Detroit Edison Company under compulsion of an order of the Securities and Exchange Commission, and that the loss on the sale, therefore, comes within the provision of the statute relating to a "compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) of property * * *." Such a loss is deductible from ordinary income.

There can be no doubt that the conversion of the property in question was under compulsion, and we think it was involuntary, but we do not think it comes within the sort of compulsory or involuntary conversions described in the limiting clause, which is enclosed in parenthesis. It can only come within that involuntary conversion which is the result of a requisition of property or a condemnation thereof, or the threat or imminence of requisition or condemnation, and we do not think it was the result of either. American's ownership of the property had become unlawful after the passage of the Public Utility Holding Company Act, and, because it was unlawful, it was ordered to dispose of it. Defendant did not take it at all, neither for its own use nor for the use of another, nor did it threaten to do so.

This will become apparent from a reading of the Public Utility Holding Company Act of 1935 (49 Stat. 803), and the circumstances surrounding the sale.

This Act directed the Securities and Exchange Commission to require all utility holding companies to simplify their corporate structure and to eliminate therefrom all holdings which were not necessary or appropriate to the operation of an integrated public utility system. Section 11(a) of the Act required the Commission "to examine the corporate structure of every registered holding company and sub-

sidiary company thereof, the relationships among the companies in the holding-company system of every such company and the character of the interests thereof and the properties owned or controlled thereby to determine the extent to which the corporate structure of such holding-company system and the companies therein may be simplified, unnecessary complexities therein eliminated, voting power fairly and equitably distributed among the holders of securities thereof, and the properties and business thereof confined to those necessary or appropriate to the operations of an integrated public-utility system."[2]

Under section 11(b)(1) the Commission was charged with the duty "to require by order, after notice and opportunity for hearing, that each registered holding-company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system; * * *."

Any order made thereunder was made subject to judicial review. Under subsection (c) of section 11 it was required that any order issued should be complied with within one year, subject to the right in the Commission to extend the time. Under subsection (d) of section 11 the Commission was authorized to apply to a court for the enforcement of its orders.

---

2. An integrated public utility system was defined as one which "may be economically operated as a single interconnected and coordinated system confined in its operations to a single area or region, in one or more States, not so large as to impair * * * the advantages of localized management, efficient operation, and the effectiveness of regulation; * * *."

Acting pursuant to the authority therein granted, the Securities and Exchange Commission on March 8, 1940 issued an order for a hearing directed to American and the other holding-companies forming a part of the system. The order recited that its system was not confined to a single integrated public utility system and, accordingly, ordered that hearings be commenced and that the companies be required to file an answer. The companies answered, asserting their right to continue their operations under their present system, but they nevertheless expressed a willingness to cooperate with the Commission, to avoid controversy, and, so, they proposed a plan for the disposition of certain properties of the system, and the grouping of the remaining assets into three geographical areas.

On June 13, 1941, the Commission issued a statement of tentative conclusions holding that the system as then constituted did not meet the standards of integration set out in the Public Utility Holding Company Act of 1935, and that, among other things, American's ownership of stock in the Detroit Edison Company must be disposed of. The Commission directed that the companies show cause why an order should not be entered in conformity therewith. The companies answered, vigorously protesting the Comission's proposed order, but the Commission, notwithstanding, on August 5, 1941, issued its decision directing, among other things, that American dispose of its Detroit Edison Company stock. The order provided that the companies should proceed "with due diligence to comply with the foregoing order, and shall make application to the Commission for the entry of any further orders necessary or appropriate for that purpose." Jurisdiction was retained for the entry of such orders as might seem necessary and appropriate.

The companies submitted their first plan on November 1,

1944, some three years later, and applied for its approval, but this was refused by the Commission on June 2, 1945.

On June 26, 1947, the companies filed another plan, known as Application 31. On September 2, 1947, the Commission delivered its opinion, in which it stated that the plan appeared to be deficient in not providing for prompt compliance with the original order of August 5, 1941. Thereupon, the companies filed an amendment to the plan on September 18, 1947. Hearings on this amended application were ordered.

On October 28, 1947, the companies filed a second amendment to the application, in which it was stated that the Detroit Edison stock would be disposed of by December 31, 1948, and proposed an immediate sale of 450,000 shares thereof. On November 19, 1947, the Commission issued an order in which it authorized the sale of the 450,000 shares of Detroit Edison stock.

Then, on December 30, 1947, the Commission entered an order approving application No. 31, as amended. It directed, among other things, that the Detroit Edison stock be disposed of, 450,000 shares in December 1947, 400,000 shares in May 1948, and 250,000 shares in October 1948, the balance to be distributed to the stockholders as dividends. In the meantime American had received a stock dividend from Detroit Edison of 128,920½ shares, the Commission ordered that these shares be disposed of in conformity with its order of August 5, 1941.

American sold 450,000 shares of the Detroit Edison stock in January 1948 at a price of $19.06 a share; in April 1948 it sold another 450,000 shares at a price of $19.73 a share; in August 1948 it sold 190,000 shares at a price of $20.01 a share; and in November 1948 it sold 192,734 shares at a

price of $19.546 a share. The balance of the stock was distributed to its stockholders.

Plaintiffs say these sales were involuntary conversions which resulted from "an exercise of the power of requisition or condemnation or the threat or imminence thereof," as these words are used in section 117(j), *supra*. Plaintiffs concede that in order to receive the tax benefits of section 117(j), a compulsory or involuntary conversion must be one which results from one of those things mentioned in the parenthetical clause of that section, in this case, requisition or condemnation or the threat thereof; but they argue, first, that the order of divestment issued by the Securities and Exchange Commission was an exercise of the power of requisition or condemnation; or, in the alternative, they say, since the Act empowered the Commission to apply to a court to appoint a receiver to take over the assets of the company and enforce the order, that the order amounted to a threat to requisition or condemn the property.

We cannot agree. The order of the Securities and Exchange Commission was neither a requisition nor a condemnation, nor the threat of either. It was nothing more than an order by the Commission for plaintiffs to dispose of property the possession of which by plaintiffs was prohibited by the Public Utility Holding Company Act. It was an order for plaintiffs to comply with the law. The Act required that "the properties and business thereof [of a public utility system] be confined to those necessary or appropriate to the operations of an integrated public utility system"; the Commission thought that American's ownership of the Detroit Edison Company stock was not necessary for this purpose; and, so, it required American to dispose of that the possession of which by it was no longer lawful.

By no means can this be considered an exercise of the power of eminent domain. The United States did not take the property; it did not take it for public use or for any use at all. On the contrary, in ordering the sale of the stock, Congress was exercising, through the Securities and Exchange Commission, its constitutional power to regulate interstate commerce. The Supreme Court has held that the Public Utility Holding Company Act of 1935, which authorized such an order, was a valid exercise of such power. *American Power & Light Co.* v. *Securities and Exchange Commission*, 329 U.S. 90; *North American Co.* v. *Securities and Exchange Commission*, 327 U.S. 686; *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U.S. 419.

The purpose of the Act was to eliminate the evils then existing in public utility holding companies, and to protect the public from the abuses inherent in them as they were then constituted. It was an Act to promote the public welfare. It was no part of its purpose to condemn or to requisition the companies' property. The Supreme Court, in *North American Company* v. *Securities and Exchange Commission*, *supra*, said that "Congress enacted the Public Utility Holding Company Act of 1935, 49 Stat. 803, in order to correct grave abuses which it had found in the use of the holding-company device in the nation's electric and gas utilities industries." It further said at pp. 705-6:

> This broad commerce clause does not operate so as to render the nation powerless to defend itself against economic forces that Congress decrees inimical or destructive of the national economy.
>
> * * * * *
>
> Congress in § 11(b)(1) of the Public Utility Holding Company Act was concerned with the economic evils resulting from uncoordinated and unintegrated public utility holding company systems. These evils

were found to be polluting the channels of interstate commerce and to take the form of transactions occurring in and concerning more states than one. Congress also found that the national welfare was thereby harmed, as well as the interests of investors and consumers. These evils, moreover, were traceable in large part to the nature and extent of the securities owned by the holding companies. Congress therefore had power under the commerce clause to attempt to remove those evils by ordering the holding companies to divest themselves of the securities that made such evils possible.

In the exercise of its regulatory powers Congress, of course, must act within the limits imposed by the Constitution. If it exceeds these limits by taking private property without due process, then the regulatory statute is invalid. In the *North American* case, *supra*, the petitioner argued that section 11(b)(1) of the Public Utility Holding Company Act of 1935 was unconstitutional, in that it amounted to a taking of private property. The Court answered this at 327 U.S. 709 by stating:

> • • • there is no basis here for assuming that in limiting the scope of North American's operations there will be dispositions of securities for inadequate considerations, thereby raising a question as to whether there is a destruction of these values without just compensation. The Act does not contemplate or require the dumping or forced liquidation of securities on the market for cash. Under §§ 11(d) and 11(e) of the Act, any divestment or reorganization plan must meet the standards of fairness and equitableness. In many instances this may involve no more than a distribution of the securities among the existing shareholders of the holding company. But should securities be sold for cash, speculation as to unfavorable market conditions cannot undermine the validity of § 11(b)(1). • • •

There is no contention that in the case at bar the securi-

ties had to be sold for less than their market value at the time of the sale.

The Public Utility Holding Company Act does not differ in principle from many other statutes that prohibit the possession of things which the legislative authority considers inimical to the public welfare: for instance, narcotics, whisky, firearms, property that is unsafe or unsanitary, or otherwise a nuisance, etc.

In *Mugler* v. *Kansas*, 123 U.S. 623, it was argued that a Kansas prohibition statute constituted a taking of private property without just compensation, as required by the due process clause of the 14th Amendment. The Court, at pages 668-9, said:

> As already stated, the present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition * * * upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. * * * The power which the states have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case,

a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.

See also *Union Bridge Co.* v. *United States*, 204 U.S. 364 (alterations of a bridge over a navigable stream); *Samuels* v. *McCurdy*, 267 U.S. 188 (making unlawful the possession of liquor purchased before the passage of the 18th Amendment); *Corneli* v. *Moore*, 257 U.S. 491 (prohibiting the transfer of liquor from the Government-bonded warehouse to the dwelling of the owner); *United States* v. *Caltex*, 344 U.S. 149 (destruction of property to prevent capture by the enemy); and *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155 (a prohibition on the mining of gold during a war emergency). In none of these cases was it held that there was a requisition or condemnation of the property.

Plaintiffs say that the term "requisition or condemnation" as used in the Act means something more than the exercise of the power of eminent domain. We do not think it does. It seems clear to us that the words mean the taking or the threat of taking property by some public or quasi-public corporation—by some instrumentality that has the power to do so against the will of the owner, and for the use of the taker. That is the common, well-recognized meaning of those words and there is nothing to indicate that Congress used them in any other sense. Plaintiffs were required to dispose of their property, but the United States did not take it, nor did it prevent plaintiffs from getting for it its full market value at the time of the taking.

Section 112(f) of the Internal Revenue Code of 1939 uses the same words as those with which we are concerned. Such a provision first appeared in the Revenue Act of 1921. They were used to take care of situations resulting from the sinking of ships by submarines or their requisition by the Government for its use, as is shown by the letter of the Secre-

tary of the Treasury to the Committee on Ways and Means when the Revenue Act of 1918 was under consideration. It read, in part:

> During the war, in the case of property requisitioned for war purposes by the Government and property lost or destroyed in whole or in part, through war hazards, especially in the case of ships, it happened that at the time of the requisition or loss the market value of such ships was considerably increased over the cost * * *, and that in practically no case would the taxpayer have been willing to sell the property for its appraised value at the time of requisition or loss.
>
> To require the taxpayer to pay income and war profits and excess profits taxes upon the difference between the cost * * * and the compensation received at the time of requisition or loss would have been to take such a large proportion of the amount received for the vessel that, although the owner desired to replace the same, the taking of the tax by the Government would have made it impossible in practically every instance.

This shows that when Congress set about to take care of situations arising from the involuntary conversion of property by destruction or the taking of it for governmental use, it used the words with which we are here concerned. This tends to support the view that Congress had in mind requisitions or condemnations under the power of eminent domain.

The Tax Court so understood these words in 112(f). See *Dear Publication & Radio, Inc.* v. *Commissioner*, 31 T.C. 1168. In a previous case, in *Credit and Investment Corp.* v. *Commissioner*, 47 B.T.A. 673, it also had so construed the words.

In the *Dear Publication & Radio* case there was involved a New Jersey statute which required the dissolution of a

corporation in case of a deadlock among the management. In order to prevent this dissolution, the taxpayer sold his stock in the corporation. He claimed that this was an involuntary conversion through requisition or condemnation or the threat thereof within the meaning of 112(f). The Court of Appeals for the Third Circuit affirmed the Tax Court, holding that a sale under such conditions was not an involuntary conversion "under threat or imminence of requisition or condemnation." *Dear Publication & Radio, Inc.* v. *Commissioner*, 274 F.2d 656.

Plaintiffs say that the threat to resort to court for the appointment of a receiver, in case of failure to comply with the Commisison's order, was a threat to requisition its property; but, manifestly, this is not so. The purpose of the appointment of a receiver was to force compliance with the Commission's order, not to take the property for public use. The order was issued to carry out the mandate of an Act passed pursuant to the power of Congress to regulate commerce, not under the power of eminent domain. Once the order was complied with and assurances given of future compliance, the property, or the amount received from a sale of any part of it, would be returned to its owner. No part of it was or would be taken for public use. None of it was requisitioned or condemned.

It results that plaintiffs' petition must be dismissed.

It is so ordered.

LITTLETON, *Judge (Ret.)*: LARAMORE, *Judge*: MADDEN, *Judge*; and JONES, *Chief Judge*, concur.

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No. 384

In the Supreme Court of the United States

OCTOBER TERM, 1960

AMERICAN NATURAL GAS COMPANY, ET AL.,
PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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AMERICAN NATURAL GAS COMPANY, ET AL.,
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THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. 21-33) is reported at 220 F. 2d 220.

JURISDICTION

The judgment of the Court of Claims was entered on June 8, 1960. (R. 51.) The petition for a writ of certiorari was filed on September 3, 1960. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1255.

QUESTION PRESENTED

Whether a divestment order of the Securities and Exchange Commission issued under the Public Utility Holding Company Act of 1935, in compliance with which taxpayer sold stock in a subsidiary company at its fair market value, constituted a "requisition or condemnation" of capital assets within the meaning of Section 117(j) of the Internal Revenue Code of 1939.

STATUTES INVOLVED

The relevant provisions of the Internal Revenue Code of 1939 (Sections 112(a), (b) (8); 117 (j)) and of the Public Utility Holding Company Act of 1935 (Sections 1 and 11) are set forth in the Appendix, *infra*, pp. 11-19.

STATEMENT

Following extensive proceedings initiated by the Securities and Exchange Commission in 1940, the Commission, acting pursuant to Section 11 of the Public Utility Holding Company Act, directed, *inter alia*, that petitioner American Natural Gas Company dispose of its ownership of stock in the Detroit Edison Company in accordance with a prescribed time schedule.[1] Ensuing sales resulted in losses. In its consolidated income tax return for 1948, American re-

[1] For a more detailed account of the course of the administrative proceedings, see the opinion below, Pet. 25-27. Note that the Commission first decided in 1941 that taxpayer should dispose of the stock and that taxpayer took six years to come forward with an acceptable plan of divestiture.

ported *capital* losses resulting from sales of the stock in the amount of $16,422,167. Thereafter, it filed claim for refund on the theory that the losses resulted from a compulsory or involuntary conversion (as a result of a requisition or condemnation) of capital assets within the meaning of Section 117(j) of the Internal Revenue Code of 1939, and were therefore deductible as *ordinary* losses. (R. 47-48.) The claim was denied, and suit for refund followed.

The Court of Claims has held that American's sale of stock pursuant to the divestment order of the S.E.C. did not constitute a requisition or condemnation of the stock within the purview of Section 117(j), and it has accordingly dismissed the complaint. (Pet. 21-33.)

ARGUMENT.

The decision below is correct. There is no conflict or any other occasion for further review.

1. The issue here is whether a loss sustained by taxpayer upon the sale of its Detroit Edison stock—the sale having resulted from a divestment order issued by the Securities Exchange Commission under Section 11 of the Public Utility Holding Company Act of 1935, Appendix, *infra*, pp. 14-15—is deductible as an ordinary loss (as claimed by petitioner) or as a capital loss (as held below). Petitioner's claim rests on the suggestion that the sales may be considered a "compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or

condemnation or the threat or imminence thereof)", within the meaning of Section 117(j) of the Internal Revenue Code of 1939, Appendix, *infra*, pp. 11-12.

The court below properly rejected the contention that the divestment order of the Securities and Exchange Commission amounted to "an exercise of the power of requisition or condemnation". The Government did not take the Detroit Edison stock for public use, or for any use at all; on the contrary, taxpayer was directed to dispose of the stock (and did so at its fair market value) because its continued ownership had become unlawful after the passage of the Public Utility Holding Company Act. *North American Co.* v. *S.E.C.*, 327 U.S. 686, 709. A disposition of property by a taxpayer in order to comply with a regulatory act of Congress does not, by any test, constitute a "requisition or condemnation" of the property. See *Mugler* v. *Kansas*, 123 U.S. 623; *Union Bridge Co.* v. *United States*, 204 U.S. 364; *Samuels* v. *McCurdy*, 267 U.S. 188; *Corneli* v. *Moore*, 257 U.S. 491; *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155. As the court below stated (Pet. 27-28, 31):

> The order of the Securities and Exchange Commission was neither a requisition nor a condemnation, nor the threat of either. It was nothing more than an order by the Commission for plaintiffs to dispose of property the possession of which by plaintiffs was prohibited by the Public Utility Holding Company Act. It was an order for plaintiffs to comply with the law. The Act required that "the properties and busi-

ness thereof [of a public utility system] be confined to those necessary or appropriate to the operations of an integrated public utility system"; the Commission thought that American's ownership of the Detroit Edison Company stock was not necessary for this purpose; and, so, it required American to dispose of that the possession of which by it was no longer lawful.

By no means can this be considered an exercise of the power of eminent domain. The United States did not take the property; it did not take it for public use or for any use at all. On the contrary, in ordering the sale of the stock, Congress was exercising, through the Securities and Exchange Commission, its constitutional power to regulate interstate commerce. * * *

* * * *

Plaintiffs say that the term "requisition or condemnation" as used in the Act means something more than the exercise of the power of eminent domain. We do not think it does. It seems clear to us that the words mean the taking or the threat of taking property by some public or quasi-public corporation—by some instrumentality that has the power to do so against the will of the owner, and for the use of the taker. That is the common, well-recognized meaning of those words and there is nothing to indicate that Congress used them in any other sense. * * *

Nothing in the taxing statute or the Public Utility Holding Company Act, their legislative history, or the relevant decisions, supports the view that the issuance of a divestment order by the Securities and Exchange Commission is to be deemed a "requisition or condemnation" of the property. The genesis and

history of the phrase indicate, rather, that it was used in Section 117(j) in its ordinary sense, *i.e.*, to denote a taking for public use.[2] Significantly, the same

[2] The term "requisition" first appeared in an interpretation of gross income under the Revenue Act of 1916, c. 463, 39 Stat. 756, and was expressly confined to cases of "property title to which has been requisitioned for war uses". T.D. 2706, 20 Treasury Decisions, Internal Revenue, 348 (1918). On the basis of this ruling, the Secretary of the Treasury, in 1918, recommended legislation to authorize deductions of amounts received by owners as compensation to replace "property title to which has been requisitioned by the Government". Notes on Revenue Act of 1918, Part 1, submitted by the Secretary of the Treasury, printed for the use of the Committee on Ways and Means (1919), p. 15, cited by the court below. (Pet. 31-32.) The recommendation was not then adopted, but was promulgated as a regulation dealing with property taken by "exercise of the power of requisition or eminent domain". Treasury Regulations 45 (1919 ed.), Art. 47. The ruling was enacted into law by Sections 214(a)(12) and 234(a)(14) of the Revenue Act of 1921, c. 136, 42 Stat. 227, after debates referring only to takings. See 61 Cong. Record, Part 5, pp. 5294, 5296. A provision for nonrecognition of gains in cases of reinvestment of proceeds of involuntary conversions resulting from a requisition or condemnation was placed into the law by Section 203(b)(5) of the Revenue Act of 1924, c. 234, 43 Stat. 253, without further or new definition, to be reenacted thereafter in subsequent statutes in substantially the same language. See Section 112(f) of the Internal Revenue Code of 1939. The last amendment was made by Section 10(2) of the Act of October 31, 1951, c. 661, 65 Stat. 733, revising Section 112(f) to meet certain problems of anticipatory purchases of replacement property and of tracing proceeds of compensation into replaced property. H. Rep. No. 798, 82d Cong., 1st Sess., pp. 1-4; S. Rep. No. 1052, 82d Cong., 1st Sess., pp. 1-4 (2 U.S.C. Cong. & Adm. Service (1951) 2598-2602). In the House debate, Chairman Doughton of the Ways and Means Committee stated that the revisions were occasioned by condemnations of large tracts of real property by the Atomic Energy Commission. 97 Cong. Record, Part 8, p. 10348.

phrase appears in Section 112(f), dealing with non-recognition of gain upon an involuntary conversion of property where the proceeds are expended to acquire similar property, and the decisions involving the application of that section construe the phrase in the same manner as did the court below. *Dear Publication & Radio, Inc.* v. *Commissioner*, 274 F. 2d 656 (C.A. 3d), affirming 31 T.C. 1168; *Credit and Investment Corp.* v. *Commissioner*, 47 B.T.A. 673.

The fact that the sale in question was involuntary, in that it was made in obedience to an order of the S.E.C., does not serve to transform it from a "sale" into a "requisition or condemnation", as those terms are used in Sections 112(f) and 117(j). A compulsory sale is nonetheless a sale within the meaning of the taxing statute (*Helvering* v. *Hammel*, 311 U.S. 504); conversely, an involuntary conversion is not a sale (*Helvering* v. *Flaccus Leather Co.*, 313 U.S. 247). It is notable that Congress has enacted special tax relief provisions dealing with recognition of gain in "Exchanges and Distributions in Obedience to Orders of Securities and Exchange Commission" pursuant to the Public Utility Holding Company Act. Internal Revenue Code of 1939, Supplement R (Sections 371-373). See S. Rep. 1567, 75th Cong., 3d Sess., p. 28 (1939-1 Cum. Bull. (Part 2) 779, 785); 83 Cong. Record, Part 5, p. 1928. If, as taxpayer assumes, sales or exchanges made pursuant to S.E.C. divestment orders must be deemed "requisitions or condemnations" within the purview of Sections 112(f) and

117(j), these special relief provisions would have been largely superfluous.[3]

2. Taxpayer mistakenly asserts (Pet. 8-9) that the decision below "cannot be reconciled" with *Commissioner* v. *Gillette Motor Co.*, 364 U.S. 130, and *Midwest Motor Express* v. *Commissioner*, 251 F. 2d 405 (C.A. 8th), certiorari denied, 358 U.S. 875. Those cases have no bearing upon the issue here presented. Unlike the instant case, they involved a conceded taking of property for public use—a wartime seizure of the taxpayer's transportation facilities by the Director of the Office of Defense Transportation pursuant to a Presidential Order to "take possession and assume control of" such facilities—and the only question there litigated and decided was whether the

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[3] Special provision has also been enacted to cover sales and exchanges to effectuate policies of the Federal Communications Commission. 1939 Code, Section 112(m). The 1954 Internal Revenue Code added special provisions covering sales of property to comply with acreage limitation provisions of federal reclamation laws (Section 1033(d)); livestock destroyed or sold because of disease (Section 1033(e)), and divestments pursuant to the Bank Holding Company Act of 1956 (Sections 1101-1103). Proposals to add specific provisions for nonrecognition of gain on divestments pursuant to anti-trust decrees have been made at least since 1947 on the ground that such divestments are not included in involuntary conversions as a result of requisitions or condemnations. House Hearings, Revenue Revisions of 1947-1948, Part 3, pp. 1100-1404, 1592-1594; House Hearings, General Revenue Revision of 1953, Part 2, pp. 1325-1326; H. Rep. No. 1128, 86th Cong., 1st Sess.; Senate Hearings on Distributions Pursuant to Orders Enforcing the Antitrust Laws, May 26 and 27, 1959. See Rev. Rul. 58-11, 1958-1 Cum. Bull. 273.

"property" seized constituted a "capital asset" within the meaning of Section 117(j).[4] In each case it was held that the Government had seized only the right to the use of the taxpayer's property, that such right was not a "capital asset", and that the compensation received was in the nature of rent taxable as ordinary income. The Detroit Edison stock which taxpayer sold was concededly a "capital asset", and the only issue here is whether the divestment order pursuant to which the stock was sold by taxpayer constituted a "requisition or condemnation" of the stock by the S.E.C. As to that issue, the answer, as indicated above, seems plain. Taxpayer does not come within the statutory terms and it accordingly has no basis for claiming that its capital loss is one which has been granted special tax treatment.

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[4] Thus at the outset of its opinion in *Gillette*, this Court stated the issue to be whether a sum received by the taxpayer "as compensation for the temporary taking by the Government of its business facilities during World War II" represented ordinary income or capital gain; and it proceeded to point out (p. 133) that "the fact that something taken by the Government is property compensable under the Fifth Amendment does not answer the entirely different question" of whether the property taken is a "capital asset".

Similarly, in *Midwest*, the Eighth Circuit stated (p. 412): "That there was a 'taking' within the meaning of the Fifth Amendment is conceded but that 'taking' should not be allowed to obscure the characteristics [capital versus noncapital nature] of what was taken by the government or received in lieu thereof by petitioner."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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NOVEMBER, 1960

APPENDIX

Internal Revenue Code of 1939:

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General Rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) *Exchange Solely in Kind.*—

* * * *

(8) *Exchanges and distributions in obedience to orders of Securities and Exchange Commission.*—In the case of any exchange or distribution described in section 371, no gain or loss shall be recognized to the extent specified in such section with respect to such exchange or distribution.

* * * *

(26 U. S. C. 1952 ed., Sec. 112.)

SEC. 117. CAPITAL GAINS AND LOSSES.

* * * *

(j) [as added by Sec. 151(b) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Gains and Losses From Involuntary Conversion and From the Sale or Exchange of Certain Property Used in the Trade or Business.*—

(1) *Definition of property used in the trade or business.*—For the purposes of this subsection, the term "property used in the trade or business" means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(l), held for more than

6 months, and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

(2) *General rule.*—If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets. For the purposes of this paragraph:

(A) In determining under this paragraph whether gains exceed losses, the gains and losses described therein shall be included only if and to the extent taken into account in computing net income, e cept that subsections (b) and (d) sh not apply.

(B) Losses upon the destruction, in whole or in part, theft or seizure, or requisition or condemnation of property used in the trade or business or capital assets. held for more than 6 months shall be considered losses from a compulsory or involuntary conversion.

* * * * *

(26 U.S.C. 1952 ed., Sec. 117.)

Public Utility Holding Company Act of 1935, c. 687, 49 Stat. 803:

TITLE I—CONTROL OF PUBLIC-UTILITY HOLDING COMPANIES

NECESSITY FOR CONTROL OF HOLDING COMPANIES

Section 1. (a) Public-utility holding companies and their subsidiary companies are affected with a national public interest in that, among other things, (1) their securities are widely marketed and distributed by means of the mails and instrumentalities of interstate commerce and are sold to a large number of investors in different States; (2) their service, sales, construction, and other contracts and arrangements are often made and performed by means of the mails and instrumentalities of interstate commerce; (3) their subsidiary public-utility companies often sell and transport gas and electric energy by the use of means and instrumentalities of interstate commerce; (4) their practices in respect of and control over subsidiary companies often materially affect the interstate commerce in which those companies engage; (5) their activities extending over many States are not susceptible of effective

control by any State and make difficult, if not impossible, effective State regulation of public-utility companies.

* * * *

(c) When abuses of the character above enumerated become persistent and wide-spread the holding company becomes an agency which, unless regulated, is injurious to investors, consumers, and the general public; and it is hereby declared to be the policy of this title, in accordance with which policy all the provisions of this title shall be interpreted, to meet the problems and eliminate the evils as enumerated in this section, connected with public-utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce; and for the purpose of effectuating such policy to compel the simplification of public-utility holding-company systems and the elimination therefrom of properties detrimental to the proper functioning of such systems, and to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided in this title.

* * * *

(15 U. S. C. 1958 ed., Sec. 79a.)

SIMPLIFICATION OF HOLDING-COMPANY SYSTEMS

Sec. 11. (a) It shall be the duty of the Commission to examine the corporate structure of every registered holding company and subsidiary company therof, the relationships among the companies in the holding-company system of every such company and the character of the

interests thereof and the properties owned or controlled thereby to determine the extent to which the corporate structure of such holding-company system and the companies therein may be simplified, unnecessary complexities therein eliminated, voting power fairly and equitable distributed among the holders of securities thereof, and the properties and business thereof confined to those necessary or appropriate to the operations of an integrated public-utility system.

(b) It shall be the duty of the Commission, as soon as practicable after January 1, 1948:

(1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system: *Provided, however*, That the Commission shall permit a registered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that—

(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;

(B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and

(C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.

The Commission may permit as reasonably incidental, or economically necessary or appropriate to the operations of one or more integrated public-utility systems the retention of an interest in any business (other than the business of a public-utility company as such) which the Commission shall find necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems.

(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. In carrying out the pro-

visions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company.

The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist: Any order made under this subsection shall be subject to judicial review as provided in section 24.

* * * *

(d) The Commission may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce compliance with any order issued under subsection (b). In any such proceeding, the court as a court of equity may, to such extent as it deems necessary for purposes of enforcement of such order, take exclusive jurisdiction and possession of the company or

companies and the assets thereof, wherever located; and the court shall have jurisdiction, in any such proceeding, to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer under the direction of the court the assets so possessed. In any proceeding for the enforcement of an order of the Commission issued under subsection (b), the trustee with the approval of the court shall have power to dispose of any or all of such assets and, subject to such terms and conditions as the court may prescribe, may make such disposition in accordance with a fair and equitable reorganization plan which shall have been approved by the Commission after opportunity for hearing. Such reorganization plan may be proposed in the first instance by the Commission, or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commision) in the reorganization.

(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and oppor-

tunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.

* * * * *

(15 U.S.C. 1958 ed., Sec. 79k.)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 384

AMERICAN NATURAL GAS COMPANY,
MADISON GAS AND ELECTRIC COMPANY,
MICHIGAN CONSOLIDATED GAS COMPANY,
MICHIGAN WISCONSIN PIPE LINE COMPANY,
MILWAUKEE GAS LIGHT COMPANY and
MILWAUKEE SOLVAY COKE COMPANY,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF FOR PETITIONERS

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TWENTIETH CENTURY PRESS, INC., CHICAGO 5

IN THE

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AMERICAN NATURAL GAS COMPANY,
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REPLY BRIEF FOR PETITIONERS

In the brief in opposition to the petition for certiorari, respondent has consistently stated that:

> "* * * the only issue here is whether the divestment order pursuant to which the stock was sold by taxpayer constituted a 'requisition or condemnation' of the stock by the S.E.C." (Br. 9).

By repeatedly making this statement (see also Br. 2, 3 and 5), respondent has attempted to avoid reference to the full language of Section 117(j) of the Internal Revenue Code of 1939 and the circumstances of the divestment order. The

precise issue before the Court of Claims, and the question presented for review, is whether the sale of the Detroit Edison stock pursuant to order of the Securities and Exchange Commission constituted a compulsory or involuntary conversion of a capital asset within the meaning of Section 117(j). The statutory clause involved is:

> "* * * compulsory or involuntary conversion (as a result of * * * seizure, or an exercise of the power of requisition or condemnation or *the threat or imminence thereof*) of * * * capital assets * * *." (Emphasis supplied)

The respondent's brief in opposition has significantly avoided reference to the phrase "the threat or imminence thereof" in Section 117(j). Respondent has also pointedly ignored the fact that under Section 11(d) of the Public Utility Holding Company Act the Securities and Exchange Commission had the power to "take exclusive jurisdiction and possession" of American's assets and had the "power to dispose of any or all of such assets." The record in this case indicates that the Commission on several occasions threatened resort to this Section 11(d) procedure (Findings 11, 13).

By thus failing to recognize the "threat or imminence" language in Section 117(j) and the threat of Commission action under Section 11(d), respondent has asserted that *Commissioner* v. *Gillette Motor Transport, Inc.*, 364 U.S. 130 (1960) and *Midwest Motor Express, Inc.* v. *Commissioner*, 251 F. 2d 405 (8th Cir. 1958) cert. den. 358 U.S. 875, "have no bearing upon the issue here presented" (Br. 8). However, respondent admits that in both *Gillette* and *Midwest* the courts recognized the parenthetical clause of Section 117(j) to be fully satisfied by the Government action

there involved, namely, the assumption of limited control of the assets of motor carriers to insure compliance with a War Labor Board order. Petitioners submit there is no substantive difference between this action and the Government action threatened here, whereby the Commission could take possession of American's assets under Section 11(d) of the Public Utility Holding Company Act. It is in this respect that the Court of Claims decision in this case cannot be reconciled with *Gillette* and *Midwest*.

Respondent asserts that Congress specifically legislated to grant tax relief to divestments under the Public Utility Holding Company Act by the enactment of Supplement R of the 1939 Code and that if Section 117(j) was to cover such divestments, the tax relief of Supplement R would have been "largely superfluous" (Br. 7-8). However, respondent neglects to point out that the enactment of Supplement R preceded Section 117(j) and that relief provisions for losses resulting from Commission divestment orders were subsequently taken out of Supplement R at the time Congress enacted Section 117(j). In the Revenue Act of 1942 Congress specifically noted that losses from such holding company divestments, which it denominated to be "involuntary" and "compulsory," were to be treated by provisions of the Internal Revenue Code outside of Supplement R. In the same act it passed Section 117(j) to provide tax relief for losses from involuntary conversions. The legislative history of the 1942 Act clearly indicates that Congress intended to grant tax relief in the case of losses resulting from such holding company divestments and that Section 117(j) was designed to provide this tax relief. See H.R. Rep. No. 2333, 77th Cong., 2nd Sess. (1942) (1942-2 Cum. Bull. 372 at 397, 415, 446, 463); S. Rep.

No. 1631, 77th Cong., 2nd Sess., (1942) (1942-2 Cum. Bull. 504 at 595, 622-3, 687).[1]

Respondent has also implied that a sale is not entitled to be treated as an involuntary conversion under the Internal Revenue Code (Br. 7). On the contrary, no court has ever denied involuntary conversion relief because the conversion was in the form of a sale of property, and sales transactions necessitated by Government action have consistently been held to be involuntary conversions under Sections 117(j) and 112(f). See e.g. *Davis Regulator Company*, 36 B.T.A. 437 (1937); *Harry G. Masser*, 30 T.C. 741 (1958); *Frank O. Maixner*, 33 T.C. 191 (1959).

CONCLUSION

For the reasons stated herein and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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SIDLEY, AUSTIN, BURGESS & SMITH,
Of Counsel.

November, 1960.

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1. Respondent in its references to legislative history in the footnote on page 6 of its brief, significantly omits any reference to the history of the Revenue Act of 1942, which first contained Section 117(j). The legislative background of that act and that of the Revenue Act of 1938, in which Supplement R was first enacted, clearly demonstrate the Congressional intent to grant Section 117(j) relief to the transaction involved here. See also Hearings before Sen. Fin. Comm. on H.R. 9682, 75th Cong. 3d Sess. pt. 4; pp. 72-3; S. Rep. No. 1567, 75th Cong. 3d Sess. (1939-1 Cum. Bull. (part 2) 779 at 785).